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No. 84-1240

FILED

MAR 7 1985

ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC. - - - Petitioner

versus

ROBERTS & SCHAEFER COMPANY - Respondent

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

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QUESTIONS PRESENTED

I. Should the Court review a decision of the United States Court of Appeals for the Sixth Circuit applying to a particular set of facts this Court's clear legal standards for exercise of federal court jurisdiction concurrent with state court action, where the Courts of Appeals are not in conflict concerning those legal standards, and where the outcome of the fact-intensive analysis is of interest only to the parties and not to the public?

II. Should the Court review the decision of the United States Court of Appeals for the Sixth Circuit holding that a District Court stay of federal litigation is improper where the sole basis for the stay is the existence of concurrent state court litigation and where the party seeking the stay has failed to demonstrate exceptional circumstances supporting decline of jurisdiction?

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LAKE COAL COMPANY, INC. - - - *Petitioner*

v.

ROBERTS & SCHAEFER COMPANY - - - *Respondent*

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
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SIXTH CIRCUIT**

Respondent, Roberts & Schaefer Company, respectfully requests the Court to deny the Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit because there are no special and important reasons to grant the Petition. The Court of Appeals' decision that the District Court improperly declined to exercise its jurisdiction due to the existence of a concurrent state court action merely involves application of well settled principles to a particular set of facts and does not involve conflict with decisions of this Court or other Courts of Appeals.

COUNTERSTATEMENT OF THE CASE

This is a diversity jurisdiction action for recovery of money due under a September 1981 contract between the parties for construction of a coal processing facility. Respondent Roberts & Schaefer Company

(R&S) employed two subcontractors for construction of the facility. Petitioner's (Lake Coal's) payment for the facility is owed to R&S, and Lake Coal has no contractual relationship with the subcontractors.

In November 1982, Lake Coal filed an action in Kentucky Circuit Court against R&S and the subcontractors, alleging breach of contract, negligent design, construction and installation, breach of warranties and fraud. Believing that the subcontractors, who are Kentucky residents, had been improperly named as parties for the sole purpose of defeating diversity jurisdiction, R&S removed to the United States District Court for the Eastern District of Kentucky. In a non-appealable remand order, the District Court disagreed with R&S as to its having carried its heavy burden of demonstrating fraudulent joinder of the subcontractors for the purpose of defeating diversity jurisdiction.

R&S immediately filed the complaint giving rise to the present action, thereby exercising its statutory right to a federal forum for its claim of money due under the contract. Lake Coal moved to dismiss or to stay the federal court case pending the conclusion of the state court case. The stay was granted, thus serving as the practical equivalent of outright dismissal of the federal court action. In its order granting the stay, the District Court improperly placed on R&S the burden of demonstrating good cause for the exercise of federal jurisdiction.

At the time of the stay, the federal action had progressed to the same early discovery stage as the state

action. The fora were equally convenient. No *res* was involved. The stay would not avoid piecemeal action. In short, there existed no reasons at all, and certainly no "exceptional circumstances," for the District Court to surrender its properly invoked jurisdiction.

R&S appealed the District Court order, and on November 20, 1984, the Court of Appeals issued its opinion that the District Court had improperly required a showing of good cause for exercise of jurisdiction [Appendix 1]. The Court of Appeals further examined the factual circumstances and determined that there existed no exceptional circumstances warranting surrender of the District Court jurisdiction. An order reversing and remanding was entered. Lake Coal's request for reconsideration was denied, and this Petition followed.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Involve Any Issue of General Importance and There Are No Special and Important Reasons to Grant the Writ.

Review on a writ of certiorari will be granted "only when there are special and important reasons therefor." Sup. Ct. R. 17.1. There are no special and important reasons to review the decision of the Court of Appeals, which merely applied to a particular set of facts decisions of this Court recognized by both parties as controlling.

It has long been established that discretionary review is limited to those matters involving questions of public importance. *Southern Power Company v.*

North Carolina Public Svc. Co., 263 U. S. 508 (1924). Where the case involved matters of fact which are "of no general importance," the Court follows the "rule of non-interference where the conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commission v. American Tobacco Co.*, 274 U. S. 543, 544 (1927).

As the Court expressed its policy in *Rice v. Sioux City Cemetery*, 349 U. S. 70, 74 (1955):

[T]his Court does not sit to satisfy a scholarly interest . . . Nor does it sit for the benefit of particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic [citations omitted].

See also, *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U. S. 498 (1951).

This is a matter involving the application of clear and undisputed principles to a particular set of facts. The outcome of the matter is of interest to the litigants, but is of no general public importance, since decision herein cannot serve to do more than solve this particular controversy. Since the principles are undisputed, and they must be applied to fact situations which will vary from case to case, review herein cannot resolve other conflicts, nor can it serve to further elucidate the law.

This is not a case in which the Court of Appeals has failed to apply this Court's clearly stated principles, nor is it one in which the Court of Appeals has

so far departed from the accepted and usual course of judicial proceedings that supervision is called for. Rather, the Court of Appeals applied this Court's clear authority, cited by *both* parties as controlling, to the particular facts of the case. No "special and important reasons" for review are advanced by Petitioner; Petitioner simply disagrees with the outcome in its particular case. Given the long-standing policy concerning review, such dissatisfaction falls far short of showing any reason for the exercise of review.

Petitioner has attempted to suggest that review would resolve a conflict of authority among the Courts of Appeals, although Petitioner cites no authority supporting its claim of existence of such a conflict. In fact, examination of the lower court cases cited in the Petition reveals that no such conflict exists, since each case decided since this Court's announcements on the issue has relied on and applied those announced principles.

For example, in *Tai Ping Insurance Co., Ltd. v. M/V Warschau*, 731 F. 2d 1141 (5th Cir. 1984), the facts revealed a district court attempt to avoid concurrent proceedings by staying arbitration pending the outcome of the federal case. The Court of Appeals, relying on the same authority utilized by the Sixth Circuit in the present case, reversed that stay, thus requiring the two matters to proceed concurrently.

P.P.G. Industries, Inc. v. Continental Oil Company, 478 F. 2d 674 (5th Cir. 1973), although predating this Court's clearest statements of the relevant principles,

actually applied those principles. In that case, the Court of Appeals approved of a stay of the federal court proceedings, but it did so on facts showing clear exceptional circumstances: The District Court action was one for a declaration of rights *and* the concurrent state court action was *in rem*. Thus, this case in no way supports Petitioner's position.

It is particularly curious that Lake Coal has cited *Gilbane Bldg. Co. v. The Nemours Foundation*, 568 F. Supp. 1085 (D. Del. 1983). In that case, the District Court applied the standards prescribed in *Colorado River Water Conservation District v. United States*, 424 U. S. 800 (1976), the same standards utilized by the Court of Appeals in the present case. The *Gilbane* court determined that there was no federal policy favoring one forum over the other (the same situation which exists in the present case), that the state court action was slightly senior to the federal action, but that no significant action had taken place (the same situation which exists in the present case), and that there was some asserted possibility of piecemeal litigation (the same situation which exists in the present case). On these facts, the *Gilbane* court held that the party seeking the stay had not demonstrated exceptional circumstances, and in accordance with *Colorado River* principles, the stay was denied (the same situation which exists in the present case).

Thus, any "conflict among the Courts of Appeals" is purely illusory, since the only differences among the cases arise from the particular facts. The clear prin-

ciples announced by this Court are applied by all Circuits, and there is no "special and important" reason for granting the writ.

Neither does there exist any lack of clarity in the law concerning who bears the burden of demonstrating the existence of exceptional circumstances. As early as *Landis v. North America*, 299 U. S. 248 (1936), this Court made it clear that a party seeking to deny another its forum has the burden of showing good cause for the denial. Subsequent cases, most notably *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U. S. 1 (1983), have left no doubt whatsoever that the party seeking stay or dismissal bears a heavy burden of demonstrating exceptional circumstances warranting rejection of jurisdiction. There exists no conflict among the Circuits regarding this principle. It was this principle which the District Court in the present case failed to apply, and which required reversal of the stay order. Again, Petitioner failed to demonstrate any "special and important" reason for review of this decision.

II. The Court of Appeals Correctly Determined That Exceptional Circumstances Did Not Exist to Justify Refusal to Exercise Jurisdiction.

The sole issue as to which Petitioner seeks review is whether the federal court case filed by R&S and the state court case filed by Lake Coal may proceed concurrently. This Court has clearly recognized that concurrent proceedings are the rule, and the abatement of federal proceedings in deference to state proceedings

is an exception which is permitted only upon the "clearest of justifications." *Colorado River, supra*. As this Court recently observed:

[W]e emphasize that our task in cases such as this is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist "exceptional" circumstances, the "clearest of justifications," that can suffice under *Colorado River* to justify the surrender of that jurisdiction.

Moses H. Cone Memorial Hospital, supra.

In this case, however, the District Court improperly placed on R&S, the non-movant, the burden of demonstrating some substantial reason for the exercise of jurisdiction by the district court. In its order granting a stay, the district court stated:

The court . . . is of the opinion that *no good cause has been shown* to justify litigating the same issues simultaneously in two different judicial systems.

District Court Order, July 14, 1983 [Appendix 2] (emphasis supplied). As the Court of Appeals observed, requiring that R&S show good cause for concurrent jurisdiction was error requiring reversal.

Indeed, it is interesting to note that the district court order found to be in error in *Moses H. Cone* similarly failed to properly allocate the burden. In that case, as in this one, the district court believed its stay order to be justified by the mere fact that a state

court action "involved the identical issue." *In re Mercury Construction*, 656 F. 2d 933 (4th Cir. 1981).

The Court of Appeals held that the district court had erred in failing to require the moving party (Lake Coal) to demonstrate exceptional circumstances justifying surrender of federal jurisdiction. This is clearly in accord with this Court's announcements on this issue.

Since the circumstances of the case were not in dispute, the Court of Appeals went on to apply the standards set forth in *Colorado River, supra*, and *Moses H. Cone, supra*, and held that no exceptional circumstances existed to justify surrender of jurisdiction. In reaching this determination, the Court of Appeals merely applied to the particular circumstances of this case the principles which this Court's opinions have required to be applied.

As the Court of Appeals noted, the state court action is not *in rem*, there was no significant difference in the relative progress of the state and federal actions, there is no significant difference in convenience of the federal versus the state forum, and both federal and state courts are capable of adjudicating the matters and applying the settled and uncomplicated law. Finally, as the Court of Appeals observed, Lake Coal has not demonstrated that it has any valid claim against the subcontractors, which is the only basis for their suggestion of the possibility of piecemeal litigation. Furthermore, even if this failure of proof did not exist, there is no reason to believe that the stay of the federal court action would serve to avoid piecemeal litigation,

since R&S (which clearly is in contractual privity with the subcontractors) could nonetheless file a separate action against the subcontractors.

In short, the record reflects no basis whatsoever for the district court's refusal to exercise jurisdiction, and certainly nothing even approaching the "exceptional circumstances" necessary for surrender of jurisdiction. Accordingly, the Court of Appeals properly reversed the stay order and remanded with directions to exercise jurisdiction. This result is clearly in accord with the principles enunciated by this Court, and there is no basis for review of the Court of Appeals' decision.

CONCLUSION

There are no special and important reasons to grant the petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit. The Court of Appeals applied the correct burden of persuasion and the correct standards for determining that no exceptional circumstances exist for surrender of district court jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition were mailed, first class postage prepaid to Ronald G. Polly and Gene Smallwood, Jr., P. O. Box 786, Whitesburg, Kentucky 41858 this ____ day of March, 1985.

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APPENDIX

APPENDIX I
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 83-5551

ROBERTS & SCHAEFER COMPANY - - *Plaintiff-Appellee*

v.

LAKE COAL COMPANY, INC. - - *Defendant-Appellee*

*On Appeal from the United States District Court
for the Eastern District of Kentucky*

OPINION—Filed November 20, 1974

Before: KEITH and CONTIE, Circuit Judges; and PECK,
Senior Circuit Judge.

CONTIE, Circuit Judge. Roberts & Schaefer Company (R&S) appeals from a district court order staying proceedings in this diversity action pending the outcome of a concurrent state court action.¹ We reverse and remand with instructions for the district court to exercise jurisdiction.

In September 1981, the parties executed a written contract under which R&S would construct a coal washing plant for Lake Coal Company, Inc. (Lake) in Letcher County, Kentucky. R&S employed two subcontractors. On November 12, 1982, Lake filed a complaint in state court against R&S and the subcontractors alleging breach of

¹The district court's order is appealable. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, — U. S. —, 103 S. Ct. 927, 933-35 (1983).

contract, negligent design, construction and installation, breach of warranties and fraud. R&S asserted a counterclaim for the contract price.

Although the presence of the subcontractors as parties destroyed complete diversity, R&S attempted to remove the action on the ground that the subcontractors had been joined as defendants solely for the purpose of defeating federal diversity jurisdiction. The district court disagreed with R&S and remanded the action to the state court because federal jurisdiction was absent.

R&S then filed this action against Lake, essentially pleading the counterclaim that it had filed in state court. The subcontractors were not joined. Lake answered and filed its counterclaim for breach of contract, negligence, breach of warranties and fraud. Lake then moved to dismiss or to stay this action, which now involves the same issues as the state court action. The district court stayed this action pending the outcome of the state court proceedings because "no good cause has been shown to justify litigating the same issues simultaneously in two different judicial systems" (App. at 294) and because fairness to the parties and the avoidance of multiplicitous and piecemeal litigation counseled against exercising concurrent jurisdiction.

The general rule is that the prior pendency of a state court action does not bar concurrent federal proceedings on the same matter. See *Will v. Calvert Fire Insurance Co.*, 437 U. S. 655, 662 (1978); *Colorado River Water Conservation District v. United States*, 424 U. S. 800, 817 (1976). Indeed, federal courts have a "virtually unflinching obligation" to exercise their jurisdiction. *Moses H. Cone Hospital v. Mercury Construction Corp.*, — U. S. —, 103 S. Ct. 927, 936 (1983); *Colorado River Water*, 424 U. S. at 817. Nevertheless, a district court may sometimes decline to exercise jurisdiction where a state court action on

the same issues is pending. The purpose of this limited exception to the duty to exercise jurisdiction is to conserve judicial resources and to promote comprehensive disposition of litigation. See *Colorado River Water*, 424 U. S. at 817. The exception is even narrower than the abstention doctrine. *Id.*, at 818.

In deciding whether or not to exercise jurisdiction in this type of case, a district court must determine whether there exist "exceptional circumstances" that justify not doing so. See *Moses H. Cone Hospital*, 103 S. Ct. at 942. Since "only the clearest or justifications," *Id.*; *Colorado River Water*, 424 U. S. at 819, will warrant a stay, the burden of persuasion is upon the party seeking the stay. Moreover, the parties agree that a district court must evaluate several factors, no one of which is determinative, in reaching its decision: (1) whether the state action is an action *in rem*, (2) whether the federal and state actions have progressed to the same stage,² (3) whether the federal forum is convenient, (4) whether the state proceedings are adequate, (5) whether the substantive claims involve federal or state law and (6) whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed.

We hold that the district court erred in assigning the burden of persuasion. Although the burden was upon Lake to show "exceptional circumstances" amounting to the "clearest of justifications" for not exercising federal jurisdiction, the district court's order indicates that the court required R&S to show good cause why concurrent jurisdiction should be exercised. This error alone is sufficient to warrant reversal.

²The progress of the federal and state actions is more relevant than the times of filing of the respective complaints. See *Moses H. Cone Hospital*, 103 S. Ct. at 940.

Furthermore, we hold that "exceptional circumstances" do not exist in this case. First, the state court action is not an action *in rem*. Second, the federal and state actions have progressed to about the same stage of discovery. Third, the federal court is only about fifty-three miles from the construction site. Fourth, both the federal and state courts appear capable of adjudicating the parties' claims and affording appropriate relief. Thus, none of the first four factors enumerated above augurs in favor of staying the federal action pending the outcome of the state proceedings.

Fifth, although both the federal and state actions involve solely questions of state law, Lake has not demonstrated either that the state law issues are so difficult or that state law is so unsettled that state court expertise is required. Accordingly, the fifth factor listed above does not constitute an exceptional circumstance justifying a refusal to exercise federal jurisdiction.

The final factor is whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed. Lake contends that piecemeal litigation will result if the federal action is not stayed because the subcontractors, whom Lake sued in state court, are not parties to the federal action. Having reviewed the arguments and the record submitted by the parties, we hold that Lake has not shown either that piecemeal litigation likely will occur if the federal action is not stayed or likely will be avoided if the federal action is stayed.

As to the former point it is noteworthy that the subcontractors are not parties to the September 1981 contract. Moreover, Lake has not shown that it has an arguably valid claim under Kentucky law against the non-signatory subcontractors. In short, Lake has not shown that the absence of the subcontractors in the federal action will result in Lake filing a separate action against them. Moreover,

piecemeal litigation could occur in the state courts in the form of a separate action by R&S against the subcontractors if R&S is held liable to Lake for damages. Hence, piecemeal litigation may not be avoidable even if the federal action is stayed.

The judgment of the district court is **REVERSED** and the case is **REMANDED** with instructions to exercise jurisdiction.

- APPENDIX II

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC., - - - *Defendant.*

ORDER—Filed July 15, 1983

The defendant has moved the Court to dismiss or stay this action pending resolution of an action involving the same issues and the same parties, et al., in Letcher Circuit Court (Civil Action No. 82-CI-414). The Court has considered the parties' responses and replies to responses to defendant's motion herein and is of the opinion that no good cause has been shown to justify litigating these same issues simultaneously in two different judicial systems. The Court being so advised,

IT IS HEREBY ORDERED, that in the interests of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court.

This the 14th day of July, 1983.

(s) G. Wix Unthank
G. Wix Unthank, Judge